IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **ROGER WILLIAM MENTCH,** Defendant and Appellant.	No. S148204

Sixth District Court of Appeal No. H028783
Santa Cruz County No. F077429
Honorable Samuel S. Stevens, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The People's Opening Brief challenges a legal argument that played no role in the Court of Appeal's decision, and attacks a defendant who does not exist.

The issue decided by the Court of Appeal, and on which the People petitioned this court for review, and on which this court granted review was as follows:

> "Whether growing and selling marijuana, counseling its use, and sporadically taking a medical marijuana user to a doctor's appointment, entitles a dealer to a 'primary caregiver defense' under the Compassionate Use Act?" (Petn. for Review, at p. 1.)

In their Opening Brief on the Merits, however, the People have changed the issue presented. The question the People now address is:

> "[Whether] primary caregiver status under the Compassionate Use Act requires more than trafficking in marijuana to medical marijuana patients." (Respondent's Opening Brief on the Merits ["Resp. Opening Brief"] at 10.)

And the People now characterize appellant as a nothing more than a "trafficker" in marijuana – a characterization the record simply does not support.

The question of whether a defendant qualifies as a primary caregiver if he does nothing more than sell marijuana to a qualifying patient is doubtless an interesting one; but it was neither the issue upon which the Court of Appeal rested its decision, nor the question this Court chose to decide. This Court granted review to decide whether a defendant who provides marijuana to a qualifying patient *and* who does numerous other tasks supportive of that patient, is entitled to a jury instruction on the primary caregiver defense. Resolution of this question manifestly does not require the Court to decide the revised question the People now want to talk about. Principles of judicial

restraint counsel against deciding a question that is unnecessary to resolution of the case. (*Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 116, n. 6.) As Chief Justice John Roberts put it, the "cardinal principle of judicial restraint [is that] if it is not necessary to decide more, it is necessary not to decide more." (*PDK Labs., Inc. v. Drug Enforcement Admin.*(D.C. Cir. 2004) 362 F.3d 786, 799 (conc. opn. of Roberts, J.).)

The question on which this Court granted review is actually far easier to decide than the one addressed in the People's Opening Brief. The question the People want to litigate is one that requires the Court to draw a bright line, based on a spotty and highly ambiguous legislative history. The question actually presented is easier because it simply requires the Court to ensure, in its gatekeeping function, that the jury deliberates only on factually supported defenses. Once it appears that the proffered defense is supported by sufficient evidence, the court's role is simply to let the jury decide. The hurdle to get the defense to the jury is low, as it should be in order to preserve the "defendant's constitutional right to have the jury determine every material issue." (*People v. Cook* (2006) 39 Cal.4th 566, 596.) Accordingly, "[d]oubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*People v. Flannel* (1979) 25 Cal.3d 668, 685.)

In the instant case, the evidence showed not only that appellant grew and sold marijuana to qualified patients. It showed that he was designated as the patients' primary caregiver, that he provided medical marijuana only to qualified patients, that he housed one of the patients, that he provided growing space to several of the qualified patients, and that he counselled them on cultivation and on the most appropriate strains of marijuana to use for their particular illness, and on the healthiest ways to ingest the marijuana, and that he took some qualified patients to doctor's appointments.

The evidence thus showed the provision of medical marijuana *plus* additional caregiving activity. It is appellant's contention that evidence of consistently providing medical marijuana *plus* some additional caretaking activity is sufficient to raise a reasonable doubt as to the existence of the primary caregiver defense, and requires a trial court to instruct on that defense. At that point, the issue properly becomes a question for the jury.

For all their rhetoric about legislative intent, the People's brief is really about the fear that a jury, even if correctly instructed, cannot be trusted to decide the issue of whether a defendant qualifies as a primary caregiver. The trial court was similarly contemptuous of the CUA. In the words of the trial judge, who refused to instruct on the caregiver defense, "[the CUA] is so stupid, quite frankly." (RT 1265.)

Convictions in marijuana cases would doubtless be easier to come by if the clarity of the issue of cultivating or providing marijuana is not muddied by considerations of whether the defendant has done enough for the qualifying patient to merit caregiver status. But leaving that question to the jury is precisely what the constitutional right to jury trial requires. That is why the judgment of the Court of Appeal must be affirmed.

Finally, appellant responds to the additional questions propounded by the court. Appellant agrees with the Attorney General that in presenting an affirmative defense, a defendant only has the burden of producing evidence, rather than a burden of proof. Appellant also agrees that CALCRIM No. 2363 properly and adequately advises the jury on the People's burden to disprove the affirmative defense.

ISSUES PRESENTED FOR REVIEW

1. Whether growing and providing medical marijuana to qualified patients, assisting those patients in growing their own medical marijuana, counseling them in the healthiest methods of administering medical marijuana, housing one of those patients, and taking some of those patients to a doctors' appointments, constitutes substantial evidence that the person is a "primary caregiver" under the Compassionate Use Act, thus requiring the trial court to instruct the jury on that defense?

2. Whether the defendant's burden to raise a reasonable doubt regarding the compassionate use defense is a burden of producing evidence under Evidence Code section 110 or a burden of proof under Evidence Code section 115?

3. Whether the trial court should instruct the jury on the defendant's burden to raise a reasonable doubt and, if so, how?

PROCEDURAL BACKGROUND

In 2003, appellant was charged in an information in Count One with cultivation marijuana (Health & Saf. Code § 11358), and, in Count Two, with possession of marijuana for sale.[1] (Health & Saf. Code, § 11359) (CT 6-8.) Trial commenced March 8, 2005. In his defense, appellant attempted to establish that he qualified as a primary caregiver under the Compassionate Use Act (the "CUA"). Such a defense, if found by the jury, would have resulted in appellant's acquittal on the marijuana charges. The trial court refused, however, to instruct the jury on the primary caregiver defense, finding that appellant had failed to adduce substantial evidence to support that instruction. (RT 1189-1190.) Instead, the trial court instructed the jury that appellant was "not authorized by the law to sell or distribute marijuana." (CT 245; RT 1554.)

The jury convicted appellant on the marijuana counts. (CT 299-306). On May 2, 2005, the trial court sentenced appellant to five days in county jail, placed him on probation for three years, and ordered him to register, under Health and Safety Code section 11590, as a narcotics offender.

Appellant appealed to the Sixth District Court of Appeal. On October 18, 2006, that court reversed the convictions on the marijuana counts, holding that the trial court's failure to instruct the jury on the primary caregiver defense deprived appellant of his right to jury trial. (*People v. Mentch* (2006) 143 Cal.App.th 1461.)

On November 20, 2005, this court granted the People's Petition for Review.

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[1] The information contained additional charges not relevant to this proceeding.

STATEMENT OF FACTS

I. Facts Underlying the Charges

A. Appellant's Caregiving Business

Appellant is a Vietnam veteran and single father of two grown children. (6 RT 1292, 1295.) At the time of trial, he was 49 years of age. Appellant had worked as a senior computer systems administrator for a semiconductor company, until he was laid off in 2002. (6 RT 1295.)

Appellant received a valid medical marijuana user card in 2001 to treat various conditions including depression, colitis and insomnia. (6 RT 1314; 5 RT 1025.) That year, he began to grow marijuana for his own medical use. (6 RT 1306-1307.)

In 2003, appellant founded Hemporium, LLC, a medical marijuana caregiving and consultancy business. (6 RT 1293.) The Hemporium, which was registered with the state, provided medical marijuana, consulting and caregiving services to five individuals, all of whom had valid medical marijuana user cards. (6 RT 1293, 1315-1316; 1318-1319.) Appellant was the sole source of medical marijuana for these five people. (6 RT 1318.) Appellant never provided medical marijuana to any person who did not have a valid medical marijuana user card. (6 RT 1317.) Though the trial court prohibited the inquiry, appellant offered to show that each of these five persons had designated appellant as their caregiver, as provided by the CUA and the Medical Marijuana Program (Health & Safety Code section11362.7 et seq.) (RT 1261-1262; 1318-1319.)

In addition to providing medical marijuana to these five patients, appellant counseled them on a number of topics related to the growth and use of medical marijuana. Appellant advised each patient on the best strain of marijuana to use for the various ailments they suffered, and on how to grow

those strains. (6 RT 1319-1320). Appellant provided growing space in his home for three of the qualified patients to grow their own medical marijuana. (6 RT 1333-1334.)

Appellant also counseled the qualified patients on the best and safest method of ingesting the marijuana, including use of honey oil so they would not have to "ingest the green part of the plant." (6 RT 1319.) He also instructed them on use of a vaporizer, as the best way to consume the plant. (6 RT 1319.)[2] Appellant testified that "there's a lot of health benefits to using [medical marijuana] that way. You're not taking in all the ingredients of the burned leaf that you're smoking, along with other types of bad stuff that there is with smoking just leaf." (6 RT 1330.) Appellant also sporadically took a couple of the five patients of the Hemporium to their doctors' appointments. (6 RT 1320.)

Depending on the financial situation of the clients, appellant would charge them for the medical marijuana a price below the street price; at times, he would not charge them at all. (6 RT 1321-1323.) On his income tax returns, appellant listed his occupation as "a caregiver, " and he reported the income from the sales of medical marijuana. (6 RT 1336.)

Two of the persons served by the Hemporium testified for the defense. Leland Besson, a 55 year old resident of Felton, California, was a caretaker for disabled people. (5 RT 1159.) He suffered from a chronic pain in his back, neck and joints, as a result of which he had difficulty moving. (5 RT 1160.) In 2003, Mr. Besson was unable to work and went on disability. (5

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[2]Appellant described the use of a vaporizer to ingest medical marijuana. The technique uses a tool like a soldering iron "that heats up an area , and you can either place medical cannabis on it or the oil and it heats up and only burns the THC and not the – the leaf part, and then you breathe the vapor from that." (6 RT 1330.)

RT 1164.) The same year, he received a medical marijuana card, and began consuming two to three grams of marijuana per day. (5 RT 1162.) The drug helped Besson move around and reduced his pain. (5 RT 1163.) Neither the People nor the court disputed that "he has medical conditions that would otherwise justify the marijuana card." (5 RT 1161.) It was further stipulated that Besson was using medical marijuana to relieve his symptoms. (5 RT 1173-1174.)

Prior to purchasing marijuana from appellant, Besson showed appellant his marijuana card. Appellant was Besson's sole provider of marijuana, and Besson purchased medical marijuana from appellant for about a year prior appellant's arrest. (5 RT 1165-1166.)

Laura Eldridge, a 40 year old woman with five children, testified that she had a valid medical marijuana card since 1999, and purchased marijuana from appellant. (5 RT 1174-1175, 1180-1182.) Ms. Eldridge suffered from migraines and post-traumatic stress disorder. (5 RT 1177-1178.) She ingested about one ounce of medical marijuana per month, all of which she obtained from appellant. (5 RT 1177.) At the time of the search, Eldridge was living in appellant's home. (5 RT 1183.) Appellant had thus assumed responsibility for her housing.

Michael Manstock, another medical marijuana patient, did not testify. Appellant testified, however, that Manstock grew a number of plants at appellant's home, and a sign on one of the rooms specifically identified Manstock's plants. (5 RT 1024-1026, 1333-1334.) Appellant also provided growing space for both Besson and Eldridge, who kept their own plants there. (6 RT 1333.)

B. The Search and Arrest

Between February and April of 2003, appellant made deposits of some $10,000 at a local bank. (5 RT 1149.) A teller noticed that the money smelled of marijuana, and the sheriff was notified. (4 RT 782.)

On June 6, 2003, officers executed a search warrant at appellant's home. (4 RT 780.) Posted near a door to a room containing marijuana plants were various documents including a physician's recommendation for appellant's medicinal use of marijuana, an Oakland Cannabis Growers' Club Certificate, and a notice from Compassionate Caregivers, an Oakland entity, stating that the plants were part of a medical marijuana crop. (5 RT 1025-1026.) Before officers began searching, appellant told them that he was a medical marijuana user and that he grew marijuana to sell to other, qualified medical marijuana patients. (5 RT 1080.)

In various rooms, officers found marijuana plants at various stages of development, growing apparatus including lights, ventilation and irrigation equipment, and books on growing marijuana. (4 RT 797-802; 5 RT 1014, 1029-1032.) Officers also found two scales (5 RT 1037), two rifles and a handgun. Neither rifle was loaded, and the handgun was found secured with a trigger lock inside a leather case, within a locked safe in a closet. (5 RT 1019-1020, 1046.)

Officer Mark Yanez offered his opinion that appellant possessed the marijuana for sale as part of a commercial business. Yanez based his opinion on the size of appellant's electrical bills, the presence of scales, the cash deposits, the fact that appellant was not working, and appellant's admission that he sold marijuana to qualified medical marijuana patients. (5 RT 1051.) Yanez admitted, however, that the search did *not* disclose the existence of many indicia commonly associated with an illicit, commercial drug

operation. Thus, officers did not find drug-user addresses or phone numbers, "pay-owe" sheets, pagers, stolen property, police scanners, or ammunition for the rifles. (5 RT 1099-1104.) There was no evidence that appellant had sold marijuana to any individual that lacked a valid medical marijuana card. Nor was there evidence of large profits. As noted, his bank deposits were scarcely over $10,000, and appellant's income tax return indicated income of $18,000 for 2003. (6 RT 1337.) Some months, appellant did not even recover his costs of producing the medical marijuana. (6 RT 1321.)

In contrast to Officer Yanez, appellant's marijuana expert, Christopher Conrad, testified that appellant's marijuana growing was hardly a commercial operation. Conrad noted there were too few starter plants for a commercial business, and that several of the rooms were too damp and moldy to support a good crop. Conrad testified that there were many varieties of plants, which was consistent with use of different strains of medical marijuana for different ailments, but inconsistent with a commercial operation, which typically grows only the most productive strains. (6 RT 1390.) At best, the Hemporium could produce 12 to 15 pounds of marijuana a year, or about enough to meet the needs of five medical marijuana users. (6 RT 1389-1395; 1555-1557.) However, considering the conditions of appellant's growing rooms and the condition of the plants, Conrad believed the actual yield would be between three and six pounds. (6 RT 1398.)

II. The Jury Instructions

A. Argument Regarding Instructions On The Primary Caregiver Defense

Following the testimony of Leland Beeson and Laura Eldridge, but before appellant testified, the court and the parties discussed the applicability

of the primary caregiver defense, and whether the jury would be instructed on it. (5 RT 1189-1196.) The trial court stated that the defense had only presented evidence showing that appellant had provided medical marijuana to qualified patients, and that mere provision of the drug was insufficient to qualify appellant as a primary caregiver under the statutes. (5 RT 1190-1192.) In the trial court's view, "the evidence is [appellant is] providing no services to either of them [Besson or Eldridge]." (5 RT 1190.) The court offered counsel the opportunity to submit additional authority on the question.

The next day, the defense filed a brief in support of the requested instruction. (CT 220-223.) The brief argued that appellant was entitled to the instruction because, for over a year, he had consistently been the sole provider of medical marijuana to Besson and Eldridge, both of whom (1) suffered from bona fide ailments that were alleviated by use of the medical marijuana; (2) had valid medical marijuana user cards; and (3) consistently relied upon appellant to provide their medical marijuana.

After additional argument on the question (6 RT 1256-1263), the trial court restated its view "that simply providing marijuana, in of of itself, to these folks does not – you don't bootstrap yourself to becoming a primary caregiver because you're providing it." (6 RT 1258.) The trial court further noted that "there was no evidence in this case that these people ever designated Mr. Mentch as their primary caregiver." (5 RT 1260.)

Defense counsel agreed that she had not elicited from either Eldredge or Besson that they had designated appellant as their primary caregiver, but only because counsel believed such testimony had been prohibited when the court granted by the court's *in limine* motion to "exclude any references that Mr. Mentch was a caregiver." (CT 147-148; 150.) Counsel stated that this

ruling had precluded her from referring to appellant as a caregiver, and in observance of this ruling, she had refrained from asking Besson and Eldridge whether they had so designated appellant. (5 RT 1261.) Defense counsel asked to recall Besson and Eldridge to elicit testimony that they had in fact designated appellant as their primary caregiver. (*Id.*) For no apparent reason, the trial court refused to permit counsel to recall Besson and Eldridge for this purpose, stating "no, you're not going to reopen the evidence as it relates to Ms. Eldridge and Mr. Besson, but the evidence isn't closed at this point in time." (6 RT 1262.) Counsel objected that the court's ruling deprived appellant of his constitutional right to a fair trial and the right to put on a defense. (5 RT 1261.)[3]

When appellant testified, he was asked if Ms. Eldridge had designated him as her primary caregiver. Appellant replied that she had. (6 RT 1318.) The trial court struck the answer as hearsay and also noted it was "irrelevant." (6 RT 1318-1319.) This ruling was bizarre, in view of the trial court's comment a few moments earlier faulting appellant for not providing evidence that either Eldridge or Besson had designated appellant as a primary caregiver.

Following the court's stated intention not to instruct on the primary caregiver defense, appellant chose to testify, and did so in the manner described above. Thereafter, defense counsel renewed her request that the jury be instructed on the caregiver defense. (7 RT 1546.) Counsel argued that "Mr. Mentch testified that he provided counseling services, in terms of how to cultivate and grow the marijuana, as well as counseling for their

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[3] In argument on the request for instruction on the caregiver defense, defense counsel reiterated that appellant had been designated a primary caregiver by the five patients to whom he provided marijuana. (5 RT 1193-1194.)

specific ailments." (*Id.*) Counsel contended that this testimony, together with that of Besson and Eldridge, "was substantial evidence presented to warrant the defense." (*Id.*) The trial court again refused to give the instruction. It disagreed that "providing instructions about the use of marijuana or the propagation of marijuana is sufficient to establish someone is a caregiver under applicable California law." (7 RT 1547.) Returning to its earlier rationale, the court stated that "there has to be something more to be a caregiver than simply providing marijuana; otherwise, there would be no reason to have the definition of a caregiver, because anybody who would be providing marijuana and related services would qualify as a caregiver." (*Id.*)

B. CUA Instructions Given By the Court

Having refused to instruct the jury on the primary caregiver defense, the only instruction the court gave pertaining to the CUA related to *appellant's own use* of marijuana as a qualified patient. Thus, pursuant to CALJIC No. 12.24.1, the trial court instructed as follows:

> As to Count[s] 1 through 4, the possession or cultivation or transportation of marijuana is not unlawful when the acts of the defendant are authorized by law for compassionate use. The possession or cultivation or transportation of marijuana is lawful, one, where its medical use is deemed appropriate and has been recommended or approved, orally or in writing, by a physician; two, the physician has determined that the person's health would benefit form the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief; and three, the marijuana possessed, cultivated, or transported was for the personal medical use of the patient; and four, the quantity of marijuana possessed or cultivated, and the form in which it was possessed, were reasonably related to the patient's then current medical needs. ...

> To establish the defense of compassionate use, the burden is upon the defendant to raise a reasonable doubt as to guilt of the unlawful possession or cultivation or transportation of marijuana."

(6 RT 1436-1438.)

In its pattern form, CALJIC No. 12.24.1 contained language providing that possession or cultivation or transportation of marijuana is not unlawful "when the acts of [defendant] [a primary caregiver] are authorized by law for compassionate use." (See CT 194-195.) The pattern instruction also defines "primary caregiver" as "an individual designated by the person exempted who has consistently assumed responsibility for the housing, health or safety of that person."

As indicated from the instruction as given, all references to "caregiver" were deleted. Thus, the crucial directive that possession of marijuana "is not unlawful when the acts of a defendant [or] a primary caregiver are authorized by law for compassionate use," became merely "the acts of a defendant...." Similarly, the court deleted in its entirety the definition of "primary caregiver" appearing in the pattern instruction.

III. Questions from the Jury During Deliberations

During deliberations, the jurors asked the trial court four questions related to the marijuana counts.

The jurors first asked: "Do the certificates displayed at Hemp Emporium LLC, allow Mr. Mentch to sell or distribute marijuana to other card holding patients under the terms of the law?" (Aug. CT 7 [Court Exh. No. 1].) To this question, the trial court responded, "given the evidence in this case, no, it's not lawful to distribute or sell to other card holders...."

(7RT 1550.)

After deliberating further, the jurors orally asked to see "the law on Proposition 215," which was the voter initiative on the CUA. (7 RT 1550.) The trial court declined to provide the jury with a copy of the law. Instead, the court referred the jury back to the relevant instructions. (7 RT 1551-1552.)

After further deliberations, the jury inquired whether appellant could "recover his cost from the manufacture of marijuana from patients using the medicine under the Act 215?" (Aug. CT 8 [Court Exh. No. 2].) The court again declined to answer directly, but referred the jury back to the instructions. (7 RT 1551.)

Finally, the jury asked whether the CUA permitted appellant to manufacture hash oil and whether he was in possession of a reasonable amount. (Aug. CT 9 [Court Exh. No. 3].) The trial court responded: "the question about was this a reasonable amount ... [t]hat's up to you, based upon the evidence ... Based on the evidence in this case, he is not authorized by the law to sell or distribute marijuana." (*Id.*) (7 RT 1552.)

Shortly thereafter, the jury returned with its guilty verdicts. (CT 245.)

In discharging the jury, the judge candidly told the jurors that, given the judge's interpretation of the CUA, the jury had little choice but to convict appellant:

> "...You were given a difficult assignment here, and part of the difficulty was the manner in which the medical marijuana law has been drafted, at least in my opinion. As you might imagine, I had some differences with the attorneys as to the application of the law, but, basically, as a result of my rulings, you were left, quite frankly, with not much choice but to find the defendant guilty of Counts 1 and 2 because of my construction of the law, and that was the manner in which you were instructed." (7 RT 1557-1558.)

OPINION OF THE COURT OF APPEAL

The court of appeal reversed the marijuana counts, holding that the trial court prejudicially erred in refusing to instruct the jury on the primary caregiver defense. (Opn. at p. 28.)

The court held that "[w]here, as here, appellant presented evidence that he not only grew medical marijuana for several qualified patients, but also counseled them on the best varieties to grow and use for their ailments and accompanied them to appointments, albeit on a sporadic basis, there was enough evidence to present to the jury. Decisions about the relative merits of a defense are reserved for the triers of fact. Accordingly, a party who chooses a jury as his or her trier of fact is entitled to their decision. As the trial court conceded in this case, the court left the jury with no choice. The jury had to find appellant guilty on counts one and two. Thus, in effect, the court directed the verdict. Given the state of the evidence, we believe that it was for the jury to decide if appellant was a primary caregiver." (Opn. at 25.)

ARGUMENT

I. THE COURT OF APPEAL CORRECTLY CONCLUDED THAT APPELLANT PRESENTED SUFFICIENT EVIDENCE TO OBTAIN A JURY INSTRUCTION ON THE CAREGIVER DEFENSE.

The People's argument that the trial court justifiably refused to instruct on the caregiver defense spans 10 pages of its brief. (Resp. Opening Brief at pp. 10-21.) All but one parargraph of that argument is dedicated to establishing that, to qualify as a "primary caregiver" under the CUA, a person must do "more than traffic[] in marijuana." (*Id.* at p. 10.) In support of this contention, the People argue that "rules of statutory construction support interpreting caregiver to exclude mere traffickers," (*id.* at p. 12), that "intepreting primary caregiver to exclude mere traffickers is consistent with the intent of the voters," (*id.* at p. 13), and that prior appellate decisions support an interpretation of primary caregiver that excludes mere traffickers, (*id.* at 16).

The People may, or may not, be right about the status of individuals who only provide medical marijuana to qualified patients,[4] but that is not the question posed by the facts of this case, or by the question presented. And it is certainly not the question on which this court granted review. Review was granted to determine whether providing medical marijuana to qualified patients, *and* performing certain additional services for them qualifies one as a "primary caregiver" under the CUA. On this question, the People have precious little to say, other than the conclusory statement that "no substantial

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[4] See *People v. Peron* (1997) 59 Cal.App.4th 1383, 1400 ["A primary caregiver who consistently grows and supplies physician-approved or prescribed medicinal marijuana for a section 11362.5 patient is serving a health need of the patient ...."].)

evidence appears that appellant engaged consistently in the homecare practice of giving marijuana patients counseling or assistance," [5] and that sporadically taking patients to doctors' appointments is insufficient to support the requested instruction. (*Id.* at 20.) As appellant explains below, he introduced far more evidence supportive of the caregiver defense than that he took patients to doctors' appointments. His evidence that he provided medical marijuana to qualified patients *plus* other caregiving activities was sufficient evidence to require an instruction on the primary caregiver defense.

A. The Duty To Instruct On Affirmative Defenses

The law regarding the trial court's duty to instruct on affirmative defenses is well established. "It is well settled that a defendant has a right to have the trial court, on its own initiative, give a jury instruction on any affirmative defense for which the record contains substantial evidence - evidence sufficient for a reasonable jury to find in favor of the defendant - unless the defense is inconsistent with the defendant's theory of the case." (*People v. Salas* (2006) 37 Cal.4th 967, 982-983, citations omitted; *People v. Michaels* (2002) 28 Cal.4th 486, 529; *People v. Breverman* (1998) 19 Cal.4th 142, 157; *People v. Stewart* (1976) 16 Cal.3d 133, 141; *People v. Flannel, supra,* 25 Cal.3d at pp. 684-685.)

Thus, whether the trial court erred by failing to instruct that appellant was not guilty of the charged offenses if he was a primary caregiver under the CUA, turns on whether appellant offered substantial evidence that, if believed by the jury, would raise a reasonable doubt as to the existence of the

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[5] It is unclear exactly what respondent means by the term, "homecare practice". The term does not appear in any relevant statute or case.

defense.[6] Appellant emphasizes that the foregoing authorities did *not* require him to adduce substantial evidence that, if believed, would establish *by a preponderance of the evidence* that he was a primary caregiver. Indeed, *Mower* specifically held that the trial court erred "by instructing the jury that [defendant] was required to prove those facts [underlying his defense] by a preponderance of the evidence." (*Id.*) Rather, the law merely required appellant to adduce evidence that, if believed, would *raise a reasonable doubt* as to whether he qualified as a primary caregiver.

Various rules have emerged from the caselaw to assist the trial courts in determining whether a defendant has introduced sufficient evidence to raise a reasonable doubt on the proffered defense.

First, "[i]n determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'" (*People v. Salas*, *supra,* 37 Cal.4th at p. 982.)

Second, doubts as to the sufficiency of the evidence should be resolved in favor of the accused. (*Id.*; *People v. Tufunga* (1999) 21 Cal.4th 935, 944; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1180.)

Third, it is only "[i]f the evidence should prove minimal and insubstantial," that the court need not give the defense instruction. (*People*

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[6] See *People v. Salas*, *supra,* 37 Cal.4th. at p. 983 [holding that, whether the trial court erred in failing to instruct on an affirmative defense "turns on whether the defendant offered substantial evidence that, if believed by the jury, would raise a reasonable doubt as to the [affirmative defense]."); *People v. Mower* (2002) 28 Cal.4th 457, 484 [holding that a defendant asserting a defense of lawful marijuana cultivation and possession under the CUA "was required merely to raise a reasonable doubt as to the facts underlying the defense in question...."]. (*Id.* at p. 484.)

v. Flannel, supra, 25 Cal.3d at p. 685.) In determining whether the evidence is insubstantial, two factors are considered. Defense instructions are not required if the defendant fails to introduce *any evidence* on a particular element of a defense.[7] And, even if the defendant produces evidence to support the defense, no instruction is required if the defendant's *own testimony* contradicts that evidence, and therefore renders the evidence supporting the proffered defense unreliable.[8]

B. The Duty To Instruct On Defenses In The Context of the Compassionate Use Statutes: *People v. Mower* and *People v. Wright*

The foregoing principles are aptly illustrated by two decisions from

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[7] E.g., *People v. Mower* (2002) 28 Cal.4th 457, 475 [instruction on primary caregiver was not required where defendant presented "no evidence whatsoever that defendant had been designated ... as a primary caregiver"]; *People v. Marshall* (1996) 13 Cal.4th 799, 849 [instruction on voluntary manslaughter was not required where "there was no evidence of provocative conduct by the [victim];]; *People v. Williams* (1992) 4 Cal.4th 354, 362 [instruction on good faith belief in consent in rape case was not required where defendant did not introduce any evidence of victim's equivocal conduct]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181 [instruction on diminished capacity was not required where defendant introduced no evidence that his "drinking had affected his mental state."].

[8] E.g., *People v. Mower, supra,* 28 Cal.4th 457 [no instruction was required where sole evidence supporting the instruction was defendant's pretrial statement that he kept marijuana plants for others, "the truth of which he denied at trial."]; *People v. Marshall* (1996) 13 Cal.4th 799, 848-849 [no instruction on voluntary manslaughter was required where defendant's own testimony that marital relations were "harmonious" contradicted his prior out-of-court statement]; *People v. Flannel, supra,* 25 Cal.3d at pp. 672-673 [no instruction on diminished capacity was required where witnesses testified that the ingestion of alcohol did not affect defendant's conduct, and "defendant's own testimony equivocated on this subject"].

this court – *People v. Wright* (2006) 40 Cal.4th 81 and *People v. Mower*, *supra,* 28 Cal.4th 457 – discussing the duty to instruct on compassionate use defenses. In *Mower*, this court held that the trial court was not required to instruct the jury on the primary caregiver defense. In *Wright*, the court held that the trial court erred by failing to instruct on a compassionate use defense. Because these two cases come to opposite conclusions on the duty to instruct, they provide useful guides to the instant case.

1. *People v. Mower*

The defendant in *Mower* had 31 marijuana plants in his home. When interviewed at a hospital, the defendant said the plants were for himself and for two other medical marijuana patients. Defendant refused to provide the names of the patients. (*People v. Mower*, *supra,* 28 Cal.4th at 465-466.) At trial, the defendant denied the truth of his prior statement, and testified that he kept all 31 plants for himself. The trial court did not instruct the jury on the primary caregiver defense. (*Id.*)

This court held that, on the evidence introduced, the defendant was not entitled to the caregiver instructions. The court noted that, to qualify as a "primary caregiver, he or she must be 'designated' as such by a qualified patient, and must have 'consistently assumed responsibility' for the qualified patient's 'housing, health, or safety.'" (*Id.* at p. 475.) "The sole evidence relevant to this issue," said the court, "was the statement made by defendant at the hospital, the truth of which he denied at trial, that he kept the 31 marijuana plants not only for himself but also for two other unnamed persons." (*Id.*) Moreover, there was "no evidence whatsoever that defendant had been designated by either one as a primary caregiver, or that he consistently assumed responsibility for either person's housing, health or

safety." (*Id.*) There was thus insufficient evidence to warrant instructions on the primary caregiver defense.

2. *People v. Wright*

The court reached a different result in *People v. Wright*, where it determined that the evidence required the trial court to instruct on a compassionate use defense. The defendant in *Wright* had been arrested in his truck after police were tipped off that the truck smelled of marijuana. Defendant denied to officers that there was marijuana in the truck, though the officers could clearly smell it. A search disclosed and electronic scale, six small baggies and two large bags of marijuana, and one large bag of marijuana containing more than a pound. At trial, defendant requested a jury instruction under the CUA. At an evidentiary hearing on defendant's request, a Dr. Eidelman testified that he recommended that defendant use marijuana for chronic pain. Defendant told Eidelman that he preferred eating it to smoking it. (*Id.* at pp. 86-87.) After the arrest, defendant saw Eidelman again and again told him that he preferred eating marijuana, and that a pound would last two to three months. At defendant's request, Eidelman wrote a receommendation for defendant's use of a pound every two or three months. (*Id.* at p. 87.) Defendant also testified at the evidentiary hearing. He described his chronic pain, and a condition that affected his appetite, both of which were assuaged by the use of marijuana.

As here, the trial court refused to give the CUA instruction. And, as here, the jury repeatedly asked the court if defendant could possess the marijuana for medical reasons. (*Id.* at p. 88.) Without the CUA instructions, the jury convicted defendant of transportation of marijuana and possession with intent to sell. As here, the court of appeal reversed based on the trial

court's failure to give the CUA instructions. (*Id.* at p. 89.)

This court affirmed, agreeing that the trial court erred in failing to provide the jury with the requested instructions. The court noted that, under the statute governing the compassionate use defense,[9] the defendant had to present substantial evidence of three things: that he was (1) a qualified patient in that he had a "serious medical condition"; (2) that the use of marijuana "has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana" in treating the condition; and (3) that the marijuana such person possessed was "for his or her own personal medical use." (*Id.* at p. 96.)

This court found that defendant had presented substantial evidence of each element: defendant's testimony regarding his chronic pain was substantial evidence of the a "serious medical condition"; Dr. Eidelman's testimony provided substantial evidence of a physician's recommendation; and defendant's testimony that the marijuana was for his personal use was substantial evidence of that fact. (*Id.*)

The court held the instructions were required even though (as the Attorney General and the dissenting justice had pointed out), the factual predicate of the compassionate use defense was undermined by the defendant's failure to identify himself to the police was a medical marijuana user, and by the fact that he had so much marijuana in his possession – an amount that was not ratified by his doctor until *after* the arrest. This court's response is critical to adjudication of the instant case. "These facts," said the

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[9] While *Wright* was pending in this court, the legislature passed the Medical Marijuana Program, which clarified the defense of personal use. Because the court found the MMP retroactive, it analyzed the case based on whether defendant was entitled to the compassionate use defense under the terms of the MMP. (*People v. Wright, supra,* 40 Cal.4th at pp. 95-96.)

court, "may have some bearing on whether the jury believes his or her CUA defense, but this is a different question than whether the defendant is entitled to assert the defense at all." (*Id.* at p. 97.)

It is not difficult to reconcile *Mower* and *Wright*. *Mower* is a classic application of the rule that no instruction is required if the evidence is insubstantial. The evidence fell short because the defendant failed to introduce any evidence on one element of the defense (that the defendant had been designated as a primary caregiver). The evidence was also insubstantial because the defendant's own testimony, which contradicted his statement in the hospital that he was a caregiver, rendered the evidentiary basis for the instruction unreliable.

By contrast, the compassionate use instructions were required in *Wright* because the defendant presented some evidence on each element of the defense (his medical condition, the physician's recommendation and personal use), and none of that evidence was rendered unreliable by the defendant's own trial testimony. While the credibility and strength of the evidence supporting the instructions may have been subject to dispute, that was a matter properly left to the jury's deliberations. It was not a basis upon which to withhold the instructions from the jury.

As appellant explains below, his case is governed by *Wright*, and is wholly distinguishable from *Mower*. Before discussing the application of those cases, however, appellant will first review the meaning and scope of the of the phrase, "primary caregiver," under the CUA, and then consider whether the evidence appellant submitted entitled him to defense instructions under *Mower* and *Wright*.

C. Appellant Introduced Substantial Evidence That, If Believed, Would Have Raised A Reasonable Doubt As To His Primary Caregiver Status

1. The Meaning Of "Primary Caregiver" Under The CUA

In 1996, the voters of this state enacted the Compassionate Use Act, which is now codified at Health & Safety Code section 11362.5. The voters' stated purpose in passing this law was "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that a person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." (Health & Saf. Code, § 11362.5, subd. (b)(1)(A).) To accomplish this purpose, subdivision (d) of section 11362.5 provides that the offenses of cultivation (Health & Saf. Code, § 11358), or possession of marijuana (Health & Saf. Code, § 11357), "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

The CUA defines a "primary caregiver" as "the individual designated by the person exempted under [the CUA] who has consistently assumed responsibility for the housing, health, or safety of that person." (Health & Saf. Code, § 11362.5, subd. (e).)

In construing this provision, the courts have had more opportunities to say what sort of evidence is insufficient to qualify one as a primary caregiver, rather than what sort of evidence is sufficient. A host of cases have thus held that merely providing medical marijuana to a qualified patient, without more, is insufficient to require instructions on the defense. (*People*

v. Frazier (2005) 128 Cal.App.4th 807, 823; *People v. Galambos* (2002) 104 Cal.1147, 1166-1167; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773. See *People v. Mower*, *supra,* 28 Cal.4th at p. 475 [instruction not required where defendant only supplied marijuana and there was no evidence a qualified patient had designated defendant as a primary caregiver, or that he provided caregiving services].)

Several cases have taken the question a step further and held that evidence that the defendant provided medical marijuana to a qualified patient *and* that he had been designated by that patient as a primary caregiver was still insufficient to require instructions on a primary caregiver defense. (*People ex rel. Lungren v. Peron*, *supra,* 59 Cal.App.4th 1383, 1397; *People v. Urziceanu*, *supra,* 132 Cal.App.4th at p. 773.) As *Peron* explained, merely designating a provider of marijuana as a primary caregiver does not satisfy the statutory definition because "the purchasing patient may never patronize [the defendant's] establishment again." (*Id.* at p. 1397.) "Thus, the 'consisten[cy]' of respondents' claimed health or safety primary caregiving of each customer is in reality a chimerical myth." (*Id.*; *People v. Urziceanu*, *supra*, 132 Cal.App.4th at p. 773 ["Defendant did not present evidence that he consistently provided for the housing, health or safety of the other members of FloraCare beyond their designation of him as a primary caregiver...."].)

Beyond excluding from the ranks of primary caregivers those defendants who only provide medical marijuana to qualified patients and who have been designated as primary caregivers, no reported decision has decided whether a defendant who, in addition to these two factors, *also* provides caregiving services is entitled to instructions on the primary caregiver defense. The employees of the Cannabis Buyers Club in *Peron* did

not provide any additional caregiver services. Nor did the employees of FloraCare in *Urziceanu*; nor did the defendants in *Mower* or *Galambos.*[10] Thus, none of these cases confronted a set of facts remotely similar to those presented by the instant case, in which the defendant presented evidence on all elements of the primary caregiver defense, i.e., that (1) he consistently provided medical marijuana only to qualified patients; (2) he was designated as a primary caregiver by those qualified patients; and (3) he provided additional caregiving services.[11]

As explained below, this evidence – addressing each element of the defense and fully supported by appellant's testimony at trial – was sufficient to raise a reasonable doubt as to the existence of the defense.

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[10] In *Galambos,* the defendant *only* sold the marijuana to an Oakland cooperative club; he had not contacted the cooperative before growing his crop, and he was unaware whether the club needed his crop to supply qualified patients. (*Id.* at p. 1164.) Though the trial court instructed on the caregiver defense, the court of appeal noted that, because he did nothing more than supply marijuana to cooperatives, "defendant did not qualify as a primary caregiver under the [CUA]." (*Id.* at p. 1165.)

[11] The trial court in *People v. Frazier, supra,* 128 Cal.App.4th at pp. 820-821, did instruct the jury on the primary caregiver defense, but the decision did not discuss the evidentiary showing that required such instruction. The evidence in *Frazier* showed only that the defendant grew marijuana for himself and three family members, all of whom had medical recommendations for marijuana. (*Id.* at pp. 813-815.) On appeal, the defendant challenged particulars of the caregiver instructions. The appellate court did not discuss whether the defendant was in fact entitled to the caregiver instructions in the first instance.

2. Appellant's Evidence That He Was Designated A Primary Caregiver by Qualified Patients, That He Provided Medical Marijuana to Those Patients, And That he Consistently Provided Some Caretaking Services Was Sufficient To Raise A Reasonable Doubt As To The Existence Of The Primary Caregiver Defense.

The evidence appellant presented in the instant case addressed each element of the primary caregiver defense.

First, the evidence showed that appellant consistently provided medical marijuana to five qualified patients. Appellant was the sole source of medical marijuana for these patients. Appellant did not sell or furnish marijuana to any person who did not have a valid medical marijuana recommendation from a physician. Appellant's marijuana growing did not appear to be a commercial enterprise; by virtue of the limited amount grown and the wide varieties of marijuana cultivated, it appeared that the marijuana was intended for medicinal purposes.

Second, though the trial record is less than tidy on this point, appellant was designated as a primary caregiver by each of the five patients. As the court of appeal noted, "by granting the prosecution's in limine [motion], the court did not permit appellant to present to the jury any evidence that Eldridge or Besson had designated him as their primary caregiver." (Opn. at 24.) Nonetheless, appellant made an offer of proof that both Eldridge and Besson had so designated him. (6 RT 1261.) Though the evidentiary portion of the case was still open, the trial court inexplicably prohibited appellant from recalling Eldridge or Besson to testify to this fact. (6 RT 1262.) When appellant took the stand, he testified that Eldridge had designated him as her primary caregiver. The trial court struck his testimony on hearsay and

relevancy grounds.[12] (6 RT 1318-1319 .) On this record, there was substantial evidence that the qualified patients to whom appellant provided medical marijuana had designated him as their primary caregiver.

Third, in addition to providing medical marijuana to qualified patients and being designated a primary caregiver, appellant also introduced evidence that he provided the qualified patients with various caregiver services. It is this evidence which distinguishes appellant's case from the vast number of cases in which defendants attempted to take advantage of the primary caregiver defense solely on the basis of providing marijuana to a person who had designated them as primary caregivers.

Appellant's evidence included that he counseled the five qualified patients on the best strains of medical marijuana for their particular illnesses. He also assisted them with their own cultivation of marijuana. Thus, appellant provided growing space in his home for Michael Manstock, Eldridge and Besson, all of whom kept and cultivated their plants there.

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[12] The trial court's ruling that the evidence was irrelevant is mind-boggling in view of this court's decision in *Mower*, holding that a defendant is not entitled to a primary caregiver instruction unless he introduces evidence "that he had been designated ... as a primary caregiver." (*People v. Mower*, *supra,* 28 Cal.4th at p. 475.) The ruling was also highly questionable in light of Health & Safety Code section 11362.7, subd. (d), which provides that a "primary caregiver means the individual, designated by a qualified patient ...."

The ruling that appellant's testimony on this point was hearsay was also erroneous. Even if not offered for the truth of the matter, the statement supported appellant's belief that Eldridge had designated him as her caregiver. Appellant's belief regarding Eldridge's status, even if untrue, was relevant as it would have supported a mistake of fact defense to the marijuana charges. (See *In re Jennings* (2004) 34 Cal.4th 254, 276-277 [in a prosecution for purchasing alcohol for an underage person who thereafter caused great bodily injury or death, defendant was entitled to raise a mistake of fact defense concerning the person's age].)

Beyond helping these qualified patients cultivate marijuana, appellant also counseled them on the best method of ingestion of medical marijuana, including use of a vaporizer and use of honey oil, which methods limited the amount of non-medicinal, vegetative matter ingested.

Further, at the time of the search, appellant was housing one of the qualified patients, Laura Eldridge. Although Eldridge had previously lived with Besson and provided for his care, she had terminated that caregiving role and moved in with appellant before the search. Additionally, after Eldridge moved out of Besson's home, for reasons that do not appear in the record, it was appellant who continued to assist Mr. Besson. He also took some of the qualified patients to medical appointments.

Appellant's evidence utterly distinguishes his case from those in which no instruction on the caregiver defense was warranted because the defendant merely provided medical marijuana to strangers. (Cf. *People v. Galambos*, 104 Cal.App.4th 1147; *People ex rel. Lungren v. Peron*, *supra,* 59 Cal.App.4th 1383; *People v. Urziceanu*, 132 Cal.App.4th 747.) Unlike these cases, appellant's extensive support for the five qualified patients ensured the element of "consistency" required by the statutory definition of a primary caregiver. (*Cf. Peron*, 59 Cal.App.4th at p. 1397; *Urziceanu*, *supra,* 132 Cal.App.4th at p. 773.) Without the sort of consistent contact that appellant demonstrated, the courts issuing these earlier decisions feared that the primary caregiver defense would be abused: that is, "a patient could designate any of a number of corner drug dealers as his or her primary caregiver in seriatim fashion." (*Urziceanu*, *supra,* 132 Cal.App.4th at p. 771.) *Peron*, too, feared that an overly expansive construction of the primary caregiver provision would simply protect "drug dealers on street corners." (*Peron*, *supra,* 59 Cal.App.4th at p. 1396. See also *People v. Galambos*,

supra, 104 Cal.App.4th at p. 1168 (primary caregiver provision had to be narrowly construed "to avoid the creation of loopholes for drug dealers.").

But that rationale simply has no application to the instant case. Based on the evidence presented, appellant is hardly the archetype of the street corner drug dealer. The relationship between appellant and the five qualified patients was consistent and abiding: appellant consistently provided them medical marijuana; appellant was their exclusive source of medical marijuana; he consistently permitted them to cultivate plants in his home for their own medical use; he counseled them on strains to plant and healthy methods of ingestion. He housed one of them, and drove others to medical appointments. On these facts, the People's fear that appellant is getting away with running a commercial drug dealing operation is not only contrary to the considerable record; it is simply irrational.

At the end of the day, the question is simply whether appellant's evidence, if believed by the jury, was sufficient "to raise a reasonable doubt as to the facts underlying the defense in question...." (*People v. Mower*, *supra,* 28 Cal.4th at p. 484.) On this question, *People v. Wright*, *supra,* 40 Cal.4th 81,is highly instructive.

In *Wright*, as noted above, the court found that the defendant's testimony, *alone*, was sufficient to raise a reasonable doubt as to whether he was a qualified patient, and whether the substantial amount of marijuana in his car was for his personal use, notwithstanding the considerable evidence that he possessed the marijuana for sale. The court further found that the testimony of defendant's doctor, *alone*, was sufficient to raise a reasonable doubt as to whether appellant had a valid, medical marijuana recommendation, notwithstanding the evidence that the doctor did not ratify the defendant's use of such a substantial amount of marijuana until *after* the

defendant's arrest. The court ultimately found, however, that the conflict in the evidence "may have some bearing on whether a jury believes [the] CUA defense, but this is a different question than whether the defendant is entitled to assert the defense at all." (*People v. Wright*, *supra,* 40 Cal.4th at p. 97.)

There is no question that appellant's evidence was far more persuasive on his proffered defense than that found sufficient in *Wright.* As in *Wright*, appellant presented evidence on every element of the defense. His evidence that he provided medical marijuana only to the five qualified patients was uncontroverted. He presented (within the unreasonable limits set by the trial court) evidence that the qualified patients had designated him as their primary caregiver. When appellant made his offer of proof on this point, the People did not state that appellant's offer would be controverted. Finally, appellant presented evidence that, *apart from providing medical marijuana*, he had provided caregiving services related to health and housing to the five patients. This evidence, too, was not controverted. There was no dispute that appellant housed Eldridge. There was no dispute that he provided three patients with space to grow their own medical marijuana, and counseled them on the best strains to grow for their illnesses, and how best to ingest it. There was no dispute that he sporadically drove patients to medical appointments.

Unlike the situation in *Wright*, there was no contrary evidence on any of these elements of the primary caregiver defense. On these facts, and in the absence of contrary evidence, it is quite possible that appellant presented evidence sufficient to justify a finding *by a preponderance* of the primary caregiver defense. But, of course, that is far more than appellant needed to show to obtain the instruction.

To the extent that the trial court believed that the lack of additional caregiving evidence undermined appellant's right to present the defense, the

words of the *Wright* court are dispositive: that may have some bearing on whether the jury believed the defense, not on whether defendant had a constitutional right to present it. The trial court erred by refusing to instruct the jury on the affirmative defense.

D. The Failure To Instruct On The Primary Caregiver Defense Was Prejudicial

The Attorney General does not even attempt to argue that, if the trial court erred in failing to instruct on the primary caregiver defense, the error was harmless. (See Resp. Opening Br. at 20.)

Nor could it. As the trial court candidly told the jury, because the trial court refused to provide the jury with instructions on the primary caregiver defense, "you were left, quite frankly, with not much choice but to find the defendant guilty of Counts 1 and 2 ...." (7 RT 1557-1558.) The Court of Appeal characterized the trial court's refusal to instruct on appellant's only defense as leaving "the jury with no choice. The jury had to find appellant guilty on counts one and two. Thus, in effect, the court directed the verdict." (Opn. at p. 25.) The Court of Appeal thus found the error prejudicial under *Chapman v. California* (1967) 386 U.S. 18.

The court of appeal noted, however, that this court has not yet determined the standard of prejudice for the failure to instruct on an affirmative defense. (Opn. at 26, citing*People v. Salas*, *supra,* 37 Cal.4th at p. 984. See also *People v. Mower*, *supra*, 28 Cal.4th 457, 484 ["[leaving] open the question of whether an instructional error [involving a CUA defense] is of federal constitutional dimension or only of state law import [citation]" because "the error requires reversal even under the less rigorous [*People v.*] *Watson* [(1956) 46 Cal.2d 818,] standard."]; and *People v.*

Wright, *supra,* 40 Cal.4th at p. 97 ["[w]e again need not decide which standard applies because in this case we conclude that the instructional error was harmless under either standard."].)

Contrary to the suggestion in *Mower* and *Wright*, however, there are not just two possible standards of prejudice that may be applied to review the erroneous denial of instructions on an affirmative defense, but four.

In addition to *Chapman* and *Watson*, courts have applied a rule of automatic reversal (*United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 11961201-1202 ["The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct ... can never be considered harmless error."]; *United States v. Zuniga* (9th cir. 1993) 989 F.2d 1109, 1111 ["We have held that failure to instruct the jury on the defendant's theory of the case, where there is evidence to support such instruction, is reversible per se and can never be considered harmless error."].)

Alternatively, California courts, including this one, have applied only a slightly less demanding standard of prejudice. In *People v. Stewart* (1976) 16 Cal.3d 133, this court stated that "An erroneous failure to instruct on an affirmative defense relied upon by the defendant constitutes a denial of this right which 'is in itself a miscarriage of justice ....' [Citations.] '...[S]uch error cannot be cured by weighing the evidence and finding it not reasonably probable that a correctly instructed jury would ...' not have convicted the defendant." [Citation.]" (*Id.* at p. 141; *People v. Sedeno* (1974) 10 Cal.3d 703, 720.) Under the *Stewart/Sedeno* regime, reversal is required unless "it is shown that the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (*People v. Stewart*, *supra,* 16 Cal.3d at p. 141; *People v.*

Sedeno, *supra,* 10 Cal.3d at p. 721.)[13]

1. Reversal Is Required Under Any Standard of Prejudice

Appellant submits that reversal is required under *any* of these four standards of prejudice.

Reversal is obviously required under the rule of automatic reversal currently applied in the Ninth Circuit.

Reversal is also required under the *Stewart/Sedeno* analysis. The omitted question – whether appellant was a primary caregiver – was not resolved by any other jury instruction or verdict.

That leaves *Chapman* and *Watson*. While appellant submits reversal is required under either standard, it is worth noting the unanimity in the caselaw for the proposition that failure to submit to the jury a legally and factually supported defense is in fact federal constitutional error. Thus, every federal circuit court that has considered the question has held the erroneous failure to submit the theory of defense to the jury violates either the due process under the Fifth Amendment or the right to jury trial under the Sixth, or both. (*Jackson v. Edwards* (2d Cir. 2005) 404 F.3d 612, 625 ; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 872, n. 4; *Whipple v. Duckworth* (7th

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[13] Interestingly, this court applied the *Sedeno* test in *People v. Wright*, *supra,* 40 Cal.4th at p. 99, to find that the failure to instruct on the CUA defense that the defendant was a qualified patient, was harmless. There, the court found that the failure to instruct that defendant possessed medical marijuana for his own use was cured by other instructions on the offense of possession for sale, on which the jury returned a guilty verdict. (*Id.*) This court explained that "the jury necessarily resolved, although in a different setting, the same factual question that would have been presented by the missing instruction." (*Id.* at p. 99, quoting *People v. Mayberry* (1975) 15 Cal.3d 143, 158.)

Cir. 1992) 957 F.2d 418, 423; *Means v. Solem* (8th Cir. 1980) 646 F.2d 322, 332; *United States v. Bartlett* (8th cir. 1988) 856 F.2d 1071, 1083; *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099; *Jones v. Dugger* (11th Cir. 1989) 867 F.2d 1277, 1279-1280). As such, the evaluation of the error is governed at least by the standard of prejudice in *Chapman v. California*. (*Barker v. Yukins*, *supra,* 199 F.3d at p. 872, n. 4; *Means v. Solem*, *supra,* 646 F.2d at p. 332; *Conde v. Henry*, *supra,* 198 F.3d at p. 741.)[14]

These courts were doubtless correct in holding that the failure to instruct the jury on the an affirmative defense supported by the evidence is an error of federal constitutional dimension. The Supreme Court has held: "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485.) Simply put, the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." (*Tyson v. Trigg* (7th Cir.1995) 50 F.3d 436, 448.)

This was the conclusion of the court of appeal in the instant case. It concluded that the error was of federal constitutional dimension and that

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[14] When the question has arisen in the context of a federal habeas corpus attack on a state conviction, the federal courts have found federal constitutional error but applied the more deferential standard of review for collateral attacks on state judgments, as required by *Brecht v. Abrahamson* (1993) 507 U.S. 619. On direct review, however, *Chapman* must be applied to review errors of federal constitutional dimension. (See *Fry v. Pliler* (2007) 127 S.Ct. 2321, 2325.)

reversal was therefore required under *Chapman*. The court of appeal was correct. The People cannot come remotely close to carrying their burden under *Chapman* of showing that the failure to instruct on the primary caregiver defense was harmless beyond a reasonable doubt.

In order to carry this burden, the People must show beyond a reasonable doubt that the jury would not have considered appellant a primary caregiver. This, they cannot do, because (as discussed above) the evidence appellant presented both raised a reasonable doubt as the existence of the defense, *and* was uncontroverted . If this evidence – including that appellant sold only to qualified patients, that he had been designated by them as their primary caregiver, and that he engaged in substantial caregiving activity – was sufficient to raise a reasonable doubt that appellant qualified as a primary caregiver, the People cannot show beyond a reasonable doubt that the error was harmless. Lest there be any doubt on the question, that is surely dispelled by the jury's questions during deliberations. The jury repeatedly inquired whether appellant was entitled under the CUA "to sell or distribute marijuana to other card holding patients." (RT 1548), and whether appellant could recover his costs. (RT 1552.) The jury was thus fully prepared to entertain appellant's CUA defense. On these facts, the question of prejudice under *Chapman* is not even close.

Indeed, even though the *Watson* standard should play no role in this case, prejudice is easily established under that standard. To show prejudice under *Watson*, there must exist "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result." (*People v. Watson*, *supra,* 46 Cal.2d at p. 837.) This court has "made clear that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract

possibility. (*Id.*, at p. 837; cf. *Strickland v. Washington* (1984) 466 U.S. 668, 693-694, 697, 698 [80 L.Ed.2d 674, 697-700, 104 S.Ct. 2052] ["reasonable probability" does not mean "more likely than not," but merely "probability sufficient to undermine confidence in the outcome"].)

Appellant meets this standard because, in order to have obtained a different result at trial, he need only have raised a reasonable doubt that his conduct was authorized by the CUA. Again, if the court of appeal was correct that jury should have been instructed on that affirmative defense, that court implicitly determined that, *if the jury believed appellant's defense evidence*, he would have been entitled to an acquittal. The question of prejudice under *Watson* thus comes down to whether it was equally probable that the jury would have believed the evidence underlying the affirmative defense. There is no question it was at least equally probable. First, appellant presented evidence on each element of the affirmative defense. Second, none of that evidence was controverted. Thus, appellant's offer of proof that each qualified patient had designated him as their primary caregiver was uncontroverted. It was also uncontroverted that appellant assumed responsibility for housing Laura Eldridge, that he helped three qualified patients cultivate their medical marijuana, that he counseled the qualified patients on the best strains to grow and the healthiest method of ingestion, and that he took some to doctor's appointments. If it was equally probable that the jury would have believed these facts – and the People offer no reason whatsoever why they would not believe them – then appellant has demonstrated prejudice under *Watson.*

Under any standard of prejudice, the trial court's error was prejudicial, and the judgment for the court of appeal should therefore be affirmed.

II. THE COURT OF APPEAL'S REVERSAL OF THE JUDGMENT SHOULD ALSO BE AFFIRMED BASED ON THE TRIAL COURT'S PREJUDICIAL FAILURE TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE CONFERRED BY THE MEDICAL MARIJUANA PROGRAM, HEALTH & SAFETY CODE § 11362.765.

At the time of trial, two separate and distinct California laws provided immunities or affirmative defenses for persons providing medical marijuana to qualified patients. First, as discussed above, the CUA provided an affirmative defense for qualified patients and their primary caregivers. (Health and Saf. Code, § 11362.5.)

Second, the Medical Marijuana Program (the "MMP"), enacted by the legislature in 2003, and codified at Health & Safety Code section 11362.7 et seq., provided that specified individuals "shall not be subject to criminal liability" under various, enumerated marijuana statutes. (Health & Saf. Code, § 11362.765, subd. (a).) The enumerated statutes include those that prohibit possession of marijuana (Health & Saf. Code, § 11357), possession of marijuana for sale (Health & Saf. Code, § 11359), cultivation of marijuana (Health & Saf. Code, § 11358), and transportation of marijuana (Health & Saf. Code, § 11360).

Subdivision (b) of section 11362.765 specifies the individuals so protected. Subdivision (b)(1) extends protection to "a qualified patient." Subdivision (b)(2) extends protection to a "designated primary caregiver." To this extent the statute mirrors the classes of individuals protected by the CUA.

Subdivision (b)(3) of section 11362.765, however, goes beyond the CUA and extends an affirmative defense to an entirely new class of persons. Subdivision (b)(3) protects:

> "Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person."

The Attorney General notes the potential application of this statute to the instant case, but argues that appellant waived its benefit by failing to raise it below. (Resp. Opening Br. at pp. 20-21, n. 5.)

The Attorney General's objection is not well-founded. The trial court had a *sua sponte* duty to instruct on the affirmative defense embodied in section 11362.765, if "there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Maury* (2003) 30 Cal.4th 342, 424.) Both factors are met in the instant case. There was substantial evidence that appellant was providing assistance to qualified patients, and that his assistance included how to administer medical marijuana and how to cultivate it. Further, while appellant sought an instruction on these facts under the primary caregiver provisions of the CUA, the provisions of that statute are not inconsistent with section 113362.765. Put otherwise, one can be both a primary caregiver under the CUA (one who assumes responsibility of the patient's housing, health or safety), and a person described in section 11362.765 (one who assists a patient in cultivating or administering medical marijuana). The fact that, in the trial court, appellant did not request an instruction under section 11362.765, does not effect a waiver on appeal.

Though the issue was not raised in the Court of Appeal, appellant submits that section 11362.765 – which directly addresses the question on which the court granted review – provides an alternative basis for affirming

the judgment of the court of appeal. Accordingly, appellant requests that the court take Health & Safety Code section 11362.765 into account in determining whether the trial court erred in failing to discharge its duties to instruct the jury on all affirmative defenses.[15] Consideration of the impact of section 11362.765 on the judgment is entirely appropriate since this court, as any appellate tribunal, "review[s] the [lower court's] ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm. 'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.'" (*People v. Geier* (2007) 41 Cal.4th 555, 602, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 976.)

This is not the first time the court has granted review on a question of interpretation of the CUA, only to have the very question settled by the a provision of the legislatively enacted MMP. In *People v. Wright, supra,* 40 Cal.4th 81, the court granted review to resolve a question which had divided the lower courts: whether the CUA, which provided an affirmative defense for enumerated marijuana felonies, implicitly provided an affirmative defense for transportation of marijuana, an offense not specifically

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[15] In view of the fact that Health & Safety Code section 11362.765 expressly resolves the very question on which the court granted review, appellant is filing along with this merits brief, a motion under California Rules of Court, rule 8.528, subd. (b), to dismiss review. Alternatively, appellant's motion requests, under California Rules of Court, rule 8.516, an order that the briefing and argument in the instant case include the effect of Health and Safety Code section 11362.765 on the issues on which the court granted review.

enumerated in the statute. In its decision, the court noted that, "[w]hile the case was pending before this court, however, the Legislature stepped in and addressed this issue directly by enacting the MMP in which it extended a CUA defense to a charge of transporting marijuana where certain conditions are met. (§ 11362.765 et seq.)" (*Id.* at p. 92.) The court then reasoned that, "[b]ecause we conclude that the MMP applies to this case, it is unnecessary to resolve the split of authority between *Trippet* and *Young*. In any event, enactment of the MMP has rendered moot the conflict between these decisions as to whether the CUA provides a defense to a charge of transportation of marijuana." (*Id.*) The court then went on to determine the effect of the provisions of the MMP on the question presented. (*Id.* at pp. 92-98.)

The instant case is no different. The question presented here is whether providing marijuana to a qualified patient, and "counseling its use" qualifies one as a primary caregiver under the CUA. Of course, that is the question as styled by the Attorney General. In reviewing the court of appeal's decision, the question for review must be broader, since that court held that the affirmative defense was available because appellant not only grew medical marijuana, but also counseled qualified patients on cultivating marijuana and administering the plant. (Opn. at pp. 20, 25.)

While this court granted review to determine if such conduct qualifies one as a primary caregiver under the CUA, the provisions of the MMP expressly and unequivocally provide the answer. Under Health and Safety Code section 11362.765, a defendant who provides "assistance to a qualified patient ... in administering medical marijuana ... or acquiring the skills necessary to cultivate or administer marijuana for medical purposes" is accorded an affirmative defense to cultivation, possession and possession for

sale. As in *People v. Wright*, the existence of this provision of the MMP "renders moot" the question whether an affirmative defense extends to a person who counsels a qualified patient on growing and administering medical marijuana. Under Health and Safety Code section 11362.765, it plainly does.[16]

Appellant therefore respectfully requests that the court consider the provisions of Health & Safety Code section 11362.765 in answering the question presented for review. That answer should be that a person, like appellant, who provides medical marijuana, and who helps a qualified patient with cultivation and administration of the medical marijuana is entitled to an affirmative defense under the MMP.

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[16] This court also retains the discretion to review contentions not raised below, (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, n. 7; *People v. Williams* (1998) 17 Cal.4th 148, 161-162), particularly regarding issues that involve "an important issue of constitutional law or a substantial right." (*Sheena K.*, *supra,* 40 Cal.4th at p. 887, n. 7.)

The applicability of Health & Safety Code section 11362.765 to the fair implementation of the CUA and the MMP is manifestly an issue of public importance. The very ability of critically ill Californians to obtain medical marijuana – a right specifically guaranteed by the CUA – is at stake. It would make little sense, either from the perspective of the implementation of this public policy or the principles of judicial economy, for this court to rule on the question of whether assisting the cultivation and administration of medical marijuana is protected under the primary caregiver provisions of the CUA, when it is expressly covered by the provisions of the MMP. Surely, if the question is important enough for review, it is important enough to get right.

v. Flannel, supra, 25 Cal.3d at p. 685.) In determining whether the evidence is insubstantial, two factors are considered. Defense instructions are not required if the defendant fails to introduce *any evidence* on a particular element of a defense.[7] And, even if the defendant produces evidence to support the defense, no instruction is required if the defendant's *own testimony* contradicts that evidence, and therefore renders the evidence supporting the proffered defense unreliable.[8]

B. The Duty To Instruct On Defenses In The Context of the Compassionate Use Statutes: *People v. Mower* and *People v. Wright*

The foregoing principles are aptly illustrated by two decisions from

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[7] E.g., *People v. Mower* (2002) 28 Cal.4th 457, 475 [instruction on primary caregiver was not required where defendant presented "no evidence whatsoever that defendant had been designated ... as a primary caregiver"]; *People v. Marshall* (1996) 13 Cal.4th 799, 849 [instruction on voluntary manslaughter was not required where "there was no evidence of provocative conduct by the [victim];]; *People v. Williams* (1992) 4 Cal.4th 354, 362 [instruction on good faith belief in consent in rape case was not required where defendant did not introduce any evidence of victim's equivocal conduct]; *People v. Ramirez* (1990) 50 Cal.3d 1158, 1181 [instruction on diminished capacity was not required where defendant introduced no evidence that his "drinking had affected his mental state."].

[8] E.g., *People v. Mower, supra,* 28 Cal.4th 457 [no instruction was required where sole evidence supporting the instruction was defendant's pretrial statement that he kept marijuana plants for others, "the truth of which he denied at trial."]; *People v. Marshall* (1996) 13 Cal.4th 799, 848-849 [no instruction on voluntary manslaughter was required where defendant's own testimony that marital relations were "harmonious" contradicted his prior out-of-court statement]; *People v. Flannel, supra,* 25 Cal.3d at pp. 672-673 [no instruction on diminished capacity was required where witnesses testified that the ingestion of alcohol did not affect defendant's conduct, and "defendant's own testimony equivocated on this subject"].

court's failure to give the CUA instructions. (*Id.* at p. 89.)

This court affirmed, agreeing that the trial court erred in failing to provide the jury with the requested instructions. The court noted that, under the statute governing the compassionate use defense,[9] the defendant had to present substantial evidence of three things: that he was (1) a qualified patient in that he had a "serious medical condition"; (2) that the use of marijuana "has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana" in treating the condition; and (3) that the marijuana such person possessed was "for his or her own personal medical use." (*Id.* at p. 96.)

This court found that defendant had presented substantial evidence of each element: defendant's testimony regarding his chronic pain was substantial evidence of the a "serious medical condition"; Dr. Eidelman's testimony provided substantial evidence of a physician's recommendation; and defendant's testimony that the marijuana was for his personal use was substantial evidence of that fact. (*Id.*)

The court held the instructions were required even though (as the Attorney General and the dissenting justice had pointed out), the factual predicate of the compassionate use defense was undermined by the defendant's failure to identify himself to the police was a medical marijuana user, and by the fact that he had so much marijuana in his possession – an amount that was not ratified by his doctor until *after* the arrest. This court's response is critical to adjudication of the instant case. "These facts," said the

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[9] While *Wright* was pending in this court, the legislature passed the Medical Marijuana Program, which clarified the defense of personal use. Because the court found the MMP retroactive, it analyzed the case based on whether defendant was entitled to the compassionate use defense under the terms of the MMP. (*People v. Wright*, *supra,* 40 Cal.4th at pp. 95-96.)

court, "may have some bearing on whether the jury believes his or her CUA defense, but this is a different question than whether the defendant is entitled to assert the defense at all." (*Id.* at p. 97.)

It is not difficult to reconcile *Mower* and *Wright*. *Mower* is a classic application of the rule that no instruction is required if the evidence is insubstantial. The evidence fell short because the defendant failed to introduce any evidence on one element of the defense (that the defendant had been designated as a primary caregiver). The evidence was also insubstantial because the defendant's own testimony, which contradicted his statement in the hospital that he was a caregiver, rendered the evidentiary basis for the instruction unreliable.

By contrast, the compassionate use instructions were required in *Wright* because the defendant presented some evidence on each element of the defense (his medical condition, the physician's recommendation and personal use), and none of that evidence was rendered unreliable by the defendant's own trial testimony. While the credibility and strength of the evidence supporting the instructions may have been subject to dispute, that was a matter properly left to the jury's deliberations. It was not a basis upon which to withhold the instructions from the jury.

As appellant explains below, his case is governed by *Wright*, and is wholly distinguishable from *Mower*. Before discussing the application of those cases, however, appellant will first review the meaning and scope of the of the phrase, "primary caregiver," under the CUA, and then consider whether the evidence appellant submitted entitled him to defense instructions under *Mower* and *Wright*.

C. Appellant Introduced Substantial Evidence That, If Believed, Would Have Raised A Reasonable Doubt As To His Primary Caregiver Status

1. The Meaning Of "Primary Caregiver" Under The CUA

In 1996, the voters of this state enacted the Compassionate Use Act, which is now codified at Health & Safety Code section 11362.5. The voters' stated purpose in passing this law was "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that a person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief." (Health & Saf. Code, § 11362.5, subd. (b)(1)(A).) To accomplish this purpose, subdivision (d) of section 11362.5 provides that the offenses of cultivation (Health & Saf. Code, § 11358), or possession of marijuana (Health & Saf. Code, § 11357), "shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

The CUA defines a "primary caregiver" as "the individual designated by the person exempted under [the CUA] who has consistently assumed responsibility for the housing, health, or safety of that person." (Health & Saf. Code, § 11362.5, subd. (e).)

In construing this provision, the courts have had more opportunities to say what sort of evidence is insufficient to qualify one as a primary caregiver, rather than what sort of evidence is sufficient. A host of cases have thus held that merely providing medical marijuana to a qualified patient, without more, is insufficient to require instructions on the defense. (*People*

v. Frazier (2005) 128 Cal.App.4th 807, 823; *People v. Galambos* (2002) 104 Cal.1147, 1166-1167; *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773. See *People v. Mower, supra,* 28 Cal.4th at p. 475 [instruction not required where defendant only supplied marijuana and there was no evidence a qualified patient had designated defendant as a primary caregiver, or that he provided caregiving services].)

Several cases have taken the question a step further and held that evidence that the defendant provided medical marijuana to a qualified patient *and* that he had been designated by that patient as a primary caregiver was still insufficient to require instructions on a primary caregiver defense. (*People ex rel. Lungren v. Peron, supra,* 59 Cal.App.4th 1383, 1397; *People v. Urziceanu, supra,* 132 Cal.App.4th at p. 773.) As *Peron* explained, merely designating a provider of marijuana as a primary caregiver does not satisfy the statutory definition because "the purchasing patient may never patronize [the defendant's] establishment again." (*Id.* at p. 1397.) "Thus, the 'consisten[cy]' of respondents' claimed health or safety primary caregiving of each customer is in reality a chimerical myth." (*Id.*; *People v. Urziceanu, supra*, 132 Cal.App.4th at p. 773 ["Defendant did not present evidence that he consistently provided for the housing, health or safety of the other members of FloraCare beyond their designation of him as a primary caregiver...."].)

Beyond excluding from the ranks of primary caregivers those defendants who only provide medical marijuana to qualified patients and who have been designated as primary caregivers, no reported decision has decided whether a defendant who, in addition to these two factors, *also* provides caregiving services is entitled to instructions on the primary caregiver defense. The employees of the Cannabis Buyers Club in *Peron* did

not provide any additional caregiver services. Nor did the employees of FloraCare in *Urziceanu*; nor did the defendants in *Mower* or *Galambos.*[10] Thus, none of these cases confronted a set of facts remotely similar to those presented by the instant case, in which the defendant presented evidence on all elements of the primary caregiver defense, i.e., that (1) he consistently provided medical marijuana only to qualified patients; (2) he was designated as a primary caregiver by those qualified patients; and (3) he provided additional caregiving services.[11]

As explained below, this evidence – addressing each element of the defense and fully supported by appellant's testimony at trial – was sufficient to raise a reasonable doubt as to the existence of the defense.

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[10] In *Galambos,* the defendant *only* sold the marijuana to an Oakland cooperative club; he had not contacted the cooperative before growing his crop, and he was unaware whether the club needed his crop to supply qualified patients. (*Id.* at p. 1164.) Though the trial court instructed on the caregiver defense, the court of appeal noted that, because he did nothing more than supply marijuana to cooperatives, "defendant did not qualify as a primary caregiver under the [CUA]." (*Id.* at p. 1165.)

[11] The trial court in *People v. Frazier*, *supra,* 128 Cal.App.4th at pp. 820-821, did instruct the jury on the primary caregiver defense, but the decision did not discuss the evidentiary showing that required such instruction. The evidence in *Frazier* showed only that the defendant grew marijuana for himself and three family members, all of whom had medical recommendations for marijuana. (*Id.* at pp. 813-815.) On appeal, the defendant challenged particulars of the caregiver instructions. The appellate court did not discuss whether the defendant was in fact entitled to the caregiver instructions in the first instance.

2. Appellant's Evidence That He Was Designated A Primary Caregiver by Qualified Patients, That He Provided Medical Marijuana to Those Patients, And That he Consistently Provided Some Caretaking Services Was Sufficient To Raise A Reasonable Doubt As To The Existence Of The Primary Caregiver Defense.

The evidence appellant presented in the instant case addressed each element of the primary caregiver defense.

First, the evidence showed that appellant consistently provided medical marijuana to five qualified patients. Appellant was the sole source of medical marijuana for these patients. Appellant did not sell or furnish marijuana to any person who did not have a valid medical marijuana recommendation from a physician. Appellant's marijuana growing did not appear to be a commercial enterprise; by virtue of the limited amount grown and the wide varieties of marijuana cultivated, it appeared that the marijuana was intended for medicinal purposes.

Second, though the trial record is less than tidy on this point, appellant was designated as a primary caregiver by each of the five patients. As the court of appeal noted, "by granting the prosecution's in limine [motion], the court did not permit appellant to present to the jury any evidence that Eldridge or Besson had designated him as their primary caregiver." (Opn. at 24.) Nonetheless, appellant made an offer of proof that both Eldridge and Besson had so designated him. (6 RT 1261.) Though the evidentiary portion of the case was still open, the trial court inexplicably prohibited appellant from recalling Eldridge or Besson to testify to this fact. (6 RT 1262.) When appellant took the stand, he testified that Eldridge had designated him as her primary caregiver. The trial court struck his testimony on hearsay and

relevancy grounds.[12] (6 RT 1318-1319 .) On this record, there was substantial evidence that the qualified patients to whom appellant provided medical marijuana had designated him as their primary caregiver.

Third, in addition to providing medical marijuana to qualified patients and being designated a primary caregiver, appellant also introduced evidence that he provided the qualified patients with various caregiver services. It is this evidence which distinguishes appellant's case from the vast number of cases in which defendants attempted to take advantage of the primary caregiver defense solely on the basis of providing marijuana to a person who had designated them as primary caregivers.

Appellant's evidence included that he counseled the five qualified patients on the best strains of medical marijuana for their particular illnesses. He also assisted them with their own cultivation of marijuana. Thus, appellant provided growing space in his home for Michael Manstock, Eldridge and Besson, all of whom kept and cultivated their plants there.

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[12] The trial court's ruling that the evidence was irrelevant is mind-boggling in view of this court's decision in *Mower*, holding that a defendant is not entitled to a primary caregiver instruction unless he introduces evidence "that he had been designated ... as a primary caregiver." (*People v. Mower*, *supra,* 28 Cal.4th at p. 475.) The ruling was also highly questionable in light of Health & Safety Code section 11362.7, subd. (d), which provides that a "primary caregiver means the individual, designated by a qualified patient ...."

The ruling that appellant's testimony on this point was hearsay was also erroneous. Even if not offered for the truth of the matter, the statement supported appellant's belief that Eldridge had designated him as her caregiver. Appellant's belief regarding Eldridge's status, even if untrue, was relevant as it would have supported a mistake of fact defense to the marijuana charges. (See *In re Jennings* (2004) 34 Cal.4th 254, 276-277 [in a prosecution for purchasing alcohol for an underage person who thereafter caused great bodily injury or death, defendant was entitled to raise a mistake of fact defense concerning the person's age].)

Beyond helping these qualified patients cultivate marijuana, appellant also counseled them on the best method of ingestion of medical marijuana, including use of a vaporizer and use of honey oil, which methods limited the amount of non-medicinal, vegetative matter ingested.

Further, at the time of the search, appellant was housing one of the qualified patients, Laura Eldridge. Although Eldridge had previously lived with Besson and provided for his care, she had terminated that caregiving role and moved in with appellant before the search. Additionally, after Eldridge moved out of Besson's home, for reasons that do not appear in the record, it was appellant who continued to assist Mr. Besson. He also took some of the qualified patients to medical appointments.

Appellant's evidence utterly distinguishes his case from those in which no instruction on the caregiver defense was warranted because the defendant merely provided medical marijuana to strangers. (Cf. *People v. Galambos*, 104 Cal.App.4th 1147; *People ex rel. Lungren v. Peron*, *supra,* 59 Cal.App.4th 1383; *People v. Urziceanu*, 132 Cal.App.4th 747.) Unlike these cases, appellant's extensive support for the five qualified patients ensured the element of "consistency" required by the statutory definition of a primary caregiver. (*Cf. Peron*, 59 Cal.App.4th at p. 1397; *Urziceanu*, *supra,* 132 Cal.App.4th at p. 773.) Without the sort of consistent contact that appellant demonstrated, the courts issuing these earlier decisions feared that the primary caregiver defense would be abused: that is, "a patient could designate any of a number of corner drug dealers as his or her primary caregiver in seriatim fashion." (*Urziceanu*, *supra,* 132 Cal.App.4th at p. 771.) *Peron*, too, feared that an overly expansive construction of the primary caregiver provision would simply protect "drug dealers on street corners." (*Peron*, *supra,* 59 Cal.App.4th at p. 1396. See also *People v. Galambos*,

supra, 104 Cal.App.4th at p. 1168 (primary caregiver provision had to be narrowly construed "to avoid the creation of loopholes for drug dealers.").

But that rationale simply has no application to the instant case. Based on the evidence presented, appellant is hardly the archetype of the street corner drug dealer. The relationship between appellant and the five qualified patients was consistent and abiding: appellant consistently provided them medical marijuana; appellant was their exclusive source of medical marijuana; he consistently permitted them to cultivate plants in his home for their own medical use; he counseled them on strains to plant and healthy methods of ingestion. He housed one of them, and drove others to medical appointments. On these facts, the People's fear that appellant is getting away with running a commercial drug dealing operation is not only contrary to the considerable record; it is simply irrational.

At the end of the day, the question is simply whether appellant's evidence, if believed by the jury, was sufficient "to raise a reasonable doubt as to the facts underlying the defense in question...." (*People v. Mower*, *supra,* 28 Cal.4th at p. 484.) On this question, *People v. Wright*, *supra*, 40 Cal.4th 81,is highly instructive.

In *Wright*, as noted above, the court found that the defendant's testimony, *alone*, was sufficient to raise a reasonable doubt as to whether he was a qualified patient, and whether the substantial amount of marijuana in his car was for his personal use, notwithstanding the considerable evidence that he possessed the marijuana for sale. The court further found that the testimony of defendant's doctor, *alone*, was sufficient to raise a reasonable doubt as to whether appellant had a valid, medical marijuana recommendation, notwithstanding the evidence that the doctor did not ratify the defendant's use of such a substantial amount of marijuana until *after* the

defendant's arrest. The court ultimately found, however, that the conflict in the evidence "may have some bearing on whether a jury believes [the] CUA defense, but this is a different question than whether the defendant is entitled to assert the defense at all." (*People v. Wright*, *supra,* 40 Cal.4th at p. 97.)

There is no question that appellant's evidence was far more persuasive on his proffered defense than that found sufficient in *Wright.* As in *Wright*, appellant presented evidence on every element of the defense. His evidence that he provided medical marijuana only to the five qualified patients was uncontroverted. He presented (within the unreasonable limits set by the trial court) evidence that the qualified patients had designated him as their primary caregiver. When appellant made his offer of proof on this point, the People did not state that appellant's offer would be controverted. Finally, appellant presented evidence that, *apart from providing medical marijuana*, he had provided caregiving services related to health and housing to the five patients. This evidence, too, was not controverted. There was no dispute that appellant housed Eldridge. There was no dispute that he provided three patients with space to grow their own medical marijuana, and counseled them on the best strains to grow for their illnesses, and how best to ingest it. There was no dispute that he sporadically drove patients to medical appointments.

Unlike the situation in *Wright*, there was no contrary evidence on any of these elements of the primary caregiver defense. On these facts, and in the absence of contrary evidence, it is quite possible that appellant presented evidence sufficient to justify a finding *by a preponderance* of the primary caregiver defense. But, of course, that is far more than appellant needed to show to obtain the instruction.

To the extent that the trial court believed that the lack of additional caregiving evidence undermined appellant's right to present the defense, the

words of the *Wright* court are dispositive: that may have some bearing on whether the jury believed the defense, not on whether defendant had a constitutional right to present it. The trial court erred by refusing to instruct the jury on the affirmative defense.

D. The Failure To Instruct On The Primary Caregiver Defense Was Prejudicial

The Attorney General does not even attempt to argue that, if the trial court erred in failing to instruct on the primary caregiver defense, the error was harmless. (See Resp. Opening Br. at 20.)

Nor could it. As the trial court candidly told the jury, because the trial court refused to provide the jury with instructions on the primary caregiver defense, "you were left, quite frankly, with not much choice but to find the defendant guilty of Counts 1 and 2 ...." (7 RT 1557-1558.) The Court of Appeal characterized the trial court's refusal to instruct on appellant's only defense as leaving "the jury with no choice. The jury had to find appellant guilty on counts one and two. Thus, in effect, the court directed the verdict." (Opn. at p. 25.) The Court of Appeal thus found the error prejudicial under *Chapman v. California* (1967) 386 U.S. 18.

The court of appeal noted, however, that this court has not yet determined the standard of prejudice for the failure to instruct on an affirmative defense. (Opn. at 26, citing*People v. Salas*, *supra,* 37 Cal.4th at p. 984. See also *People v. Mower*, *supra*, 28 Cal.4th 457, 484 ["[leaving] open the question of whether an instructional error [involving a CUA defense] is of federal constitutional dimension or only of state law import [citation]" because "the error requires reversal even under the less rigorous [*People v.*] *Watson* [(1956) 46 Cal.2d 818,] standard."]; and *People v.*

Wright, supra, 40 Cal.4th at p. 97 ["[w]e again need not decide which standard applies because in this case we conclude that the instructional error was harmless under either standard."].)

Contrary to the suggestion in *Mower* and *Wright*, however, there are not just two possible standards of prejudice that may be applied to review the erroneous denial of instructions on an affirmative defense, but four.

In addition to *Chapman* and *Watson*, courts have applied a rule of automatic reversal (*United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 11961201-1202 ["The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct ... can never be considered harmless error."]; *United States v. Zuniga* (9th cir. 1993) 989 F.2d 1109, 1111 ["We have held that failure to instruct the jury on the defendant's theory of the case, where there is evidence to support such instruction, is reversible per se and can never be considered harmless error."].)

Alternatively, California courts, including this one, have applied only a slightly less demanding standard of prejudice. In *People v. Stewart* (1976) 16 Cal.3d 133, this court stated that "An erroneous failure to instruct on an affirmative defense relied upon by the defendant constitutes a denial of this right which 'is in itself a miscarriage of justice ....' [Citations.] '...[S]uch error cannot be cured by weighing the evidence and finding it not reasonably probable that a correctly instructed jury would ...' not have convicted the defendant." [Citation.]" (*Id.* at p. 141; *People v. Sedeno* (1974) 10 Cal.3d 703, 720.) Under the *Stewart/Sedeno* regime, reversal is required unless "it is shown that the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (*People v. Stewart*, *supra,* 16 Cal.3d at p. 141; *People v.*

Sedeno, supra, 10 Cal.3d at p. 721.)[13]

1. Reversal Is Required Under Any Standard of Prejudice

Appellant submits that reversal is required under *any* of these four standards of prejudice.

Reversal is obviously required under the rule of automatic reversal currently applied in the Ninth Circuit.

Reversal is also required under the *Stewart/Sedeno* analysis. The omitted question – whether appellant was a primary caregiver – was not resolved by any other jury instruction or verdict.

That leaves *Chapman* and *Watson*. While appellant submits reversal is required under either standard, it is worth noting the unanimity in the caselaw for the proposition that failure to submit to the jury a legally and factually supported defense is in fact federal constitutional error. Thus, every federal circuit court that has considered the question has held the erroneous failure to submit the theory of defense to the jury violates either the due process under the Fifth Amendment or the right to jury trial under the Sixth, or both. (*Jackson v. Edwards* (2d Cir. 2005) 404 F.3d 612, 625 ; *Barker v. Yukins* (6th Cir. 1999) 199 F.3d 867, 872, n. 4; *Whipple v. Duckworth* (7th

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[13] Interestingly, this court applied the *Sedeno* test in *People v. Wright, supra,* 40 Cal.4th at p. 99, to find that the failure to instruct on the CUA defense that the defendant was a qualified patient, was harmless. There, the court found that the failure to instruct that defendant possessed medical marijuana for his own use was cured by other instructions on the offense of possession for sale, on which the jury returned a guilty verdict. (*Id.*) This court explained that "the jury necessarily resolved, although in a different setting, the same factual question that would have been presented by the missing instruction." (*Id.* at p. 99, quoting *People v. Mayberry* (1975) 15 Cal.3d 143, 158.)

Cir. 1992) 957 F.2d 418, 423; *Means v. Solem* (8th Cir. 1980) 646 F.2d 322, 332; *United States v. Bartlett* (8th cir. 1988) 856 F.2d 1071, 1083; *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739; *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099; *Jones v. Dugger* (11th Cir. 1989) 867 F.2d 1277, 1279-1280). As such, the evaluation of the error is governed at least by the standard of prejudice in *Chapman v. California*. (*Barker v. Yukins*, *supra,* 199 F.3d at p. 872, n. 4; *Means v. Solem*, *supra,* 646 F.2d at p. 332; *Conde v. Henry*, *supra,* 198 F.3d at p. 741.)[14]

These courts were doubtless correct in holding that the failure to instruct the jury on the an affirmative defense supported by the evidence is an error of federal constitutional dimension. The Supreme Court has held: "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485.) Simply put, the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." (*Tyson v. Trigg* (7th Cir.1995) 50 F.3d 436, 448.)

This was the conclusion of the court of appeal in the instant case. It concluded that the error was of federal constitutional dimension and that

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[14] When the question has arisen in the context of a federal habeas corpus attack on a state conviction, the federal courts have found federal constitutional error but applied the more deferential standard of review for collateral attacks on state judgments, as required by *Brecht v. Abrahamson* (1993) 507 U.S. 619. On direct review, however, *Chapman* must be applied to review errors of federal constitutional dimension. (See *Fry v. Pliler* (2007) 127 S.Ct. 2321, 2325.)

reversal was therefore required under *Chapman*. The court of appeal was correct. The People cannot come remotely close to carrying their burden under *Chapman* of showing that the failure to instruct on the primary caregiver defense was harmless beyond a reasonable doubt.

In order to carry this burden, the People must show beyond a reasonable doubt that the jury would not have considered appellant a primary caregiver. This, they cannot do, because (as discussed above) the evidence appellant presented both raised a reasonable doubt as the existence of the defense, *and* was uncontroverted . If this evidence – including that appellant sold only to qualified patients, that he had been designated by them as their primary caregiver, and that he engaged in substantial caregiving activity – was sufficient to raise a reasonable doubt that appellant qualified as a primary caregiver, the People cannot show beyond a reasonable doubt that the error was harmless. Lest there be any doubt on the question, that is surely dispelled by the jury's questions during deliberations. The jury repeatedly inquired whether appellant was entitled under the CUA "to sell or distribute marijuana to other card holding patients." (RT 1548), and whether appellant could recover his costs. (RT 1552.) The jury was thus fully prepared to entertain appellant's CUA defense. On these facts, the question of prejudice under *Chapman* is not even close.

Indeed, even though the *Watson* standard should play no role in this case, prejudice is easily established under that standard. To show prejudice under *Watson*, there must exist "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result." (*People v. Watson*, *supra,* 46 Cal.2d at p. 837.) This court has "made clear that a 'probability' in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract

possibility. (*Id.*, at p. 837; cf. *Strickland v. Washington* (1984) 466 U.S. 668, 693-694, 697, 698 [80 L.Ed.2d 674, 697-700, 104 S.Ct. 2052] ["reasonable probability" does not mean "more likely than not," but merely "probability sufficient to undermine confidence in the outcome"].)

Appellant meets this standard because, in order to have obtained a different result at trial, he need only have raised a reasonable doubt that his conduct was authorized by the CUA. Again, if the court of appeal was correct that jury should have been instructed on that affirmative defense, that court implicitly determined that, *if the jury believed appellant's defense evidence*, he would have been entitled to an acquittal. The question of prejudice under *Watson* thus comes down to whether it was equally probable that the jury would have believed the evidence underlying the affirmative defense. There is no question it was at least equally probable. First, appellant presented evidence on each element of the affirmative defense. Second, none of that evidence was controverted. Thus, appellant's offer of proof that each qualified patient had designated him as their primary caregiver was uncontroverted. It was also uncontroverted that appellant assumed responsibility for housing Laura Eldridge, that he helped three qualified patients cultivate their medical marijuana, that he counseled the qualified patients on the best strains to grow and the healthiest method of ingestion, and that he took some to doctor's appointments. If it was equally probable that the jury would have believed these facts – and the People offer no reason whatsoever why they would not believe them – then appellant has demonstrated prejudice under *Watson.*

Under any standard of prejudice, the trial court's error was prejudicial, and the judgment for the court of appeal should therefore be affirmed.

II. THE COURT OF APPEAL'S REVERSAL OF THE JUDGMENT SHOULD ALSO BE AFFIRMED BASED ON THE TRIAL COURT'S PREJUDICIAL FAILURE TO INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE CONFERRED BY THE MEDICAL MARIJUANA PROGRAM, HEALTH & SAFETY CODE § 11362.765.

At the time of trial, two separate and distinct California laws provided immunities or affirmative defenses for persons providing medical marijuana to qualified patients. First, as discussed above, the CUA provided an affirmative defense for qualified patients and their primary caregivers. (Health and Saf. Code, § 11362.5.)

Second, the Medical Marijuana Program (the "MMP"), enacted by the legislature in 2003, and codified at Health & Safety Code section 11362.7 et seq., provided that specified individuals "shall not be subject to criminal liability" under various, enumerated marijuana statutes. (Health & Saf. Code, § 11362.765, subd. (a).) The enumerated statutes include those that prohibit possession of marijuana (Health & Saf. Code, § 11357), possession of marijuana for sale (Health & Saf. Code, § 11359), cultivation of marijuana (Health & Saf. Code, § 11358), and transportation of marijuana (Health & Saf. Code, § 11360).

Subdivision (b) of section 11362.765 specifies the individuals so protected. Subdivision (b)(1) extends protection to "a qualified patient." Subdivision (b)(2) extends protection to a "designated primary caregiver." To this extent the statute mirrors the classes of individuals protected by the CUA.

Subdivision (b)(3) of section 11362.765, however, goes beyond the CUA and extends an affirmative defense to an entirely new class of persons. Subdivision (b)(3) protects:

> "Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person."

The Attorney General notes the potential application of this statute to the instant case, but argues that appellant waived its benefit by failing to raise it below. (Resp. Opening Br. at pp. 20-21, n. 5.)

The Attorney General's objection is not well-founded. The trial court had a *sua sponte* duty to instruct on the affirmative defense embodied in section 11362.765, if "there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Maury* (2003) 30 Cal.4th 342, 424.) Both factors are met in the instant case. There was substantial evidence that appellant was providing assistance to qualified patients, and that his assistance included how to administer medical marijuana and how to cultivate it. Further, while appellant sought an instruction on these facts under the primary caregiver provisions of the CUA, the provisions of that statute are not inconsistent with section 113362.765. Put otherwise, one can be both a primary caregiver under the CUA (one who assumes responsibility of the patient's housing, health or safety), and a person described in section 11362.765 (one who assists a patient in cultivating or administering medical marijuana). The fact that, in the trial court, appellant did not request an instruction under section 11362.765, does not effect a waiver on appeal.

Though the issue was not raised in the Court of Appeal, appellant submits that section 11362.765 – which directly addresses the question on which the court granted review – provides an alternative basis for affirming

the judgment of the court of appeal. Accordingly, appellant requests that the court take Health & Safety Code section 11362.765 into account in determining whether the trial court erred in failing to discharge its duties to instruct the jury on all affirmative defenses.[15] Consideration of the impact of section 11362.765 on the judgment is entirely appropriate since this court, as any appellate tribunal, "review[s] the [lower court's] ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm. 'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.'" (*People v. Geier* (2007) 41 Cal.4th 555, 602, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 976.)

This is not the first time the court has granted review on a question of interpretation of the CUA, only to have the very question settled by the a provision of the legislatively enacted MMP. In *People v. Wright, supra,* 40 Cal.4th 81, the court granted review to resolve a question which had divided the lower courts: whether the CUA, which provided an affirmative defense for enumerated marijuana felonies, implicitly provided an affirmative defense for transportation of marijuana, an offense not specifically

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[15] In view of the fact that Health & Safety Code section 11362.765 expressly resolves the very question on which the court granted review, appellant is filing along with this merits brief, a motion under California Rules of Court, rule 8.528, subd. (b), to dismiss review. Alternatively, appellant's motion requests, under California Rules of Court, rule 8.516, an order that the briefing and argument in the instant case include the effect of Health and Safety Code section 11362.765 on the issues on which the court granted review.

enumerated in the statute. In its decision, the court noted that, "[w]hile the case was pending before this court, however, the Legislature stepped in and addressed this issue directly by enacting the MMP in which it extended a CUA defense to a charge of transporting marijuana where certain conditions are met. (§ 11362.765 et seq.)" (*Id.* at p. 92.) The court then reasoned that, "[b]ecause we conclude that the MMP applies to this case, it is unnecessary to resolve the split of authority between *Trippet* and *Young*. In any event, enactment of the MMP has rendered moot the conflict between these decisions as to whether the CUA provides a defense to a charge of transportation of marijuana." (*Id.*) The court then went on to determine the effect of the provisions of the MMP on the question presented. (*Id.* at pp. 92-98.)

The instant case is no different. The question presented here is whether providing marijuana to a qualified patient, and "counseling its use" qualifies one as a primary caregiver under the CUA. Of course, that is the question as styled by the Attorney General. In reviewing the court of appeal's decision, the question for review must be broader, since that court held that the affirmative defense was available because appellant not only grew medical marijuana, but also counseled qualified patients on cultivating marijuana and administering the plant. (Opn. at pp. 20, 25.)

While this court granted review to determine if such conduct qualifies one as a primary caregiver under the CUA, the provisions of the MMP expressly and unequivocally provide the answer. Under Health and Safety Code section 11362.765, a defendant who provides "assistance to a qualified patient ... in administering medical marijuana ... or acquiring the skills necessary to cultivate or administer marijuana for medical purposes" is accorded an affirmative defense to cultivation, possession and possession for

sale. As in *People v. Wright*, the existence of this provision of the MMP "renders moot" the question whether an affirmative defense extends to a person who counsels a qualified patient on growing and administering medical marijuana. Under Health and Safety Code section 11362.765, it plainly does.[16]

Appellant therefore respectfully requests that the court consider the provisions of Health & Safety Code section 11362.765 in answering the question presented for review. That answer should be that a person, like appellant, who provides medical marijuana, and who helps a qualified patient with cultivation and administration of the medical marijuana is entitled to an affirmative defense under the MMP.

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[16] This court also retains the discretion to review contentions not raised below, (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, n. 7; *People v. Williams* (1998) 17 Cal.4th 148, 161-162), particularly regarding issues that involve "an important issue of constitutional law or a substantial right." (*Sheena K.*, *supra,* 40 Cal.4th at p. 887, n. 7.)

The applicability of Health & Safety Code section 11362.765 to the fair implementation of the CUA and the MMP is manifestly an issue of public importance. The very ability of critically ill Californians to obtain medical marijuana – a right specifically guaranteed by the CUA – is at stake. It would make little sense, either from the perspective of the implementation of this public policy or the principles of judicial economy, for this court to rule on the question of whether assisting the cultivation and administration of medical marijuana is protected under the primary caregiver provisions of the CUA, when it is expressly covered by the provisions of the MMP. Surely, if the question is important enough for review, it is important enough to get right.

III. APPELLANT AGREES WITH THE ATTORNEY GENERAL THAT THE DEFENDANT'S BURDEN TO RAISE A REASONABLE DOUBT IS ONE OF PRODUCING EVIDENCE UNDER EVIDENCE CODE SECTION 110

People v. Mower, *supra,* 28 Cal.4th 457, held that in asserting defenses provided in the CUA, the defendant has the burden "merely to raise a reasonable doubt as to the facts underlying the defense in question...." (*Id.* at p. 484.) The court has now asked the parties to address the question whether that burden is a burden of producing evidence under Evidence Code section 110 or a burden of proof under Evidence Code section 115.

Appellant agrees with the Attorney General that the burden is simply one of producing evidence under section 110. (See Resp. Opening Br. at pp. 21-28.) Because the affirmative defenses provided in the CUA negate the element of unlawfulness contained in the criminal statutes pertaining to marijuana (*Mower*, *supra,* 28 Cal.4th at p. 482; *People v. Frazier*, *supra,* 128 Cal.App.4th at p. 818), the defendant is only required to raise a reasonable doubt as to his guilt, while the burden of proving guilt remains with the prosecution. (*Mower*, *supra,* 28 Cal.4th at pp. 479-480.) Once the defendant produces sufficient evidence on an affirmative defense which, if believed by the jury, raises a reasonable doubt as to the defendant's guilt, the trial court is obligated to instruct the jury on that affirmative defense, and the defendant carries no further burden. (*People v. Salas,* supra, 37 Cal.4th at p. 982.)

Defendant's burden is thus one merely of producing evidence, rather than a burden of proof.

IV. APPELLANT ALSO AGREES WITH RESPONDENT THAT IT IS PREFERABLE FOR THE TRIAL COURT ONLY TO INSTRUCT THAT A DEFENDANT IS ENTITLED TO AN ACQUITTAL IF A REASONABLE DOUBT EXISTS AS TO A COMPASSIONATE USE DEFENSE.

The court has also solicited briefing on whether the trial court should instruct the jury on the defendant's burden to raise a reasonable doubt. Appellant agrees with the Attorney General that, in light of the risk that a jury might interpret in an unconstitutional way an instruction that the defendant has a burden in a criminal case, it is preferable to limit any instruction on burdens to the prosecution's burden to prove beyond a reasonable doubt that the defendant was not authorized to cultivate, possess, or transport marijuana.

In informing the jury that, to establish the defense of compassionate use, "the burden is upon the defendant to raise a reasonable doubt as to guilt of the unlawful possession, CALJIC No. 12.24.1 may suggest to the legally unsophisticated juror that the defendant carries some burden of proof. CALCRIM No. 2363 avoids this pitfall by keeping the burden of proof where it belongs in a criminal case – on the prosecution. The CALCRIM instruction thus has the twin virtues of being both legally correct and less likely to mislead non-lawyers in evaluation of the evidence in a criminal case. In light of the correct instruction that the defendant is entitled to an aquittal if the People fail to carry their burden of proving beyond a reasonable doubt that defendant was not authorized to possess or transport marijuana, any further instruction that defendant has the burden to raise a reasonable doubt offers no incremental advantage.

As a practical matter, the issue of whether defendant met this burden is *only* relevant to the trial judge when he or she decides whether to instruct

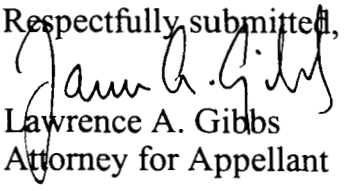
the jury on the defense. Once that decision has been made, the jurors are properly and adequately guided by the language in CALCRIM No. 23.63. No further instruction is required or desirable.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Dated: August 12, 2007

Respectfully submitted,



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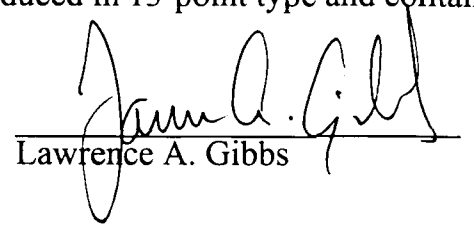
CERTIFICATE PER CAL. RULES OF COURT, RULE 14(c)

I certify that this brief produced in 13-point type and contains 13,158 words.

Date: August 12, 2007



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PROOF OF SERVICE

Case: *People v. Roger Mentch*

I declare that I am employed in the County of Alameda. I am over the age of eighteen years and not a party to this cause. My business address is P.O. Box 7639, Berkeley, California. Today, I served the foregoing**Answer Brief on the Merits** on all parties in this cause by placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at Berkeley, CA, addressed as follows:

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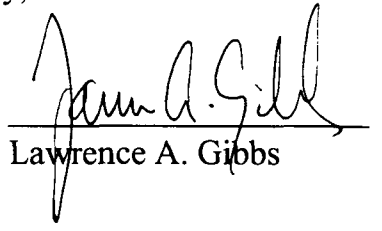
I declare under penalty of perjury that the foregoing is true and correct. Executed on August 13, 2007, in Berkeley, California.



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